Filed 12/9/15 In re N.P. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re N.P., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. L.P. et al., Defendants and Appellants.	E063000 (Super.Ct.No. SWJ1300221) OPINION

APPEAL from the Superior Court of Riverside County. Timothy F. Freer, Judge. Reversed with directions.

Leslie A. Barry, under appointment by the Court of Appeal, for Defendant and Appellant L.P.

Robert McLaughlin, under appointment by the Court of Appeal, for Defendant and Appellant C.R.

Gregory P. Priamos, County Counsel, James E. Brown, Guy B. Pittman, and Carole A. Nunes Fong, Deputy County Counsel, for Plaintiff and Respondent.

Defendants and appellants L.P. (Father) and C.R. (Mother) appeal from the juvenile court's order terminating their parental rights under Welfare and Institutions Code section 366.26[1] as to their 30-month-old son N.P. The parents' sole contention on appeal is that the juvenile court erred in finding the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.) did not apply because the notice requirements of the ICWA were not satisfied, requiring reversal of the order terminating parental rights. After a thorough review of the entire record, we agree that the notice provisions of ICWA were not adequately complied with and will remand the matter for that limited purpose.

I

FACTUAL AND PROCEDURAL BACKGROUND[2]

A. *Background*

Because this appeal concerns only the adequacy of the ICWA notice, we provide only a brief overview of the facts relating to the dependency. We have taken judicial

[1] All future statutory references are to the Welfare and Institutions Code unless otherwise stated.

[2] The factual and procedural background is taken from this court's nonpublished opinion in Mother's prior appeal unless otherwise indicated. (*In re N.P.* (June 9, 2015, E061489) [nonpub. opn.].)

notice of two earlier appeals in this matter, case Nos. E061489 and E062211, filed by Mother and Father, respectively.[3]

The family came to the attention of the Florida Department of Children and Families (Florida DCF) in October 2010 based on allegations of parental substance abuse and neglect of the parents' then two-year-old daughter.[4] Mother's daughter was declared a dependent of the court by the Florida juvenile court and removed from parental custody in February 2011 after Mother tested positive for cocaine, methadone, marijuana, and oxycodone, and the parents had engaged in domestic violence. The parents were provided with reunification services but failed to reunify with their daughter. Their parental rights as to their daughter were eventually terminated by the Florida juvenile court.

On February 24, 2013, Mother tested positive for methamphetamine and amphetamines while she was pregnant with her then unborn son, N.P. On March 1, 2013, the Florida juvenile court ordered Mother to enter into an inpatient substance abuse treatment program to protect her unborn child. Instead of entering an inpatient drug treatment program, Mother and Father left Florida and moved to California where they resided with the maternal grandmother.

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[3] In case No. E061489 (*In re N.P.*, *supra*, E061489), we rejected Mother's challenges pertaining to the termination of her reunification services. Case No. E062211, which was filed as a writ petition pursuant to California Rules of Court, rule 8.452, after Father's services were terminated at the 18-month review hearing, was withdrawn by Father on November 25, 2014.

[4] Mother's daughter is not a party to this appeal.

After Mother gave birth to N.P. on March 26, 2013, on March 28, 2013, the Riverside County Department of Public Social Services (DPSS) took the child into protective custody and placed him in a foster home. The child was declared a dependent of the court on June 4, 2013, and the parents were provided with reunification services.

The parents were initially compliant with their case plan. However, they could not maintain their sobriety. Mother tested positive for methadone on March 21, 2014, and submitted three diluted drug tests. On July 7, 2014, at the 12-month review hearing, the juvenile court terminated Mother's reunification services and continued services for Father.

In September 2014, Father tested positive for methamphetamine and missed subsequent drug tests and visits with the child. Father's services were terminated on October 23, 2014, and a section 366.26 hearing was set.

Meanwhile, the child was thriving in the home of his non-relative prospective adoptive parents where he had been placed since he was three days old in March 2013. The child was a happy and healthy toddler who was very bonded to his prospective adoptive parents. The child looked to his prospective adoptive parents as his parents, and required special needs such as therapy and attention likely due to being drug exposed in utero. The prospective adoptive parents were extremely bonded to the child, and were committed to adopting him and meeting the child's special needs.

On February 23, 2015, at the contested section 366.26 hearing, the juvenile court found the child adoptable and terminated Mother and Father's parental rights.

In the current appeal, the parents do not challenge the substance of the dependency court's decision to terminate their parental rights. Rather, they challenge only the court's determination that ICWA is not applicable in this case, a finding that affects whether the prospective adoptive parents are afforded adoptive placement preference. (25 U.S.C., § 1915, subd. (a); *In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1281.)

B. *ICWA Issues*

On March 27, 2013, Father informed the social worker that he "thinks his mother is Cherokee." He also stated that no family members are registered with the Cherokee tribe. In the detention report, the social worker reported that Father said "he has no Native Indian ancestry." Mother denied any Native American Indian ancestry.

On April 3, 2013, Father filed a Parental Notification of Indian Status form (Judicial Council Forms, form ICWA-020, hereafter ICWA-020 form), checking the box that stated, "I may have Indian ancestry" with a handwritten notation that stated, "u/k," indicating unknown. Father did not check the boxes on the form that asked whether Father was a member of an Indian tribe, whether the child was a member of an Indian tribe, or whether lineal ancestors were members of recognized tribes. Father also did not include the name of any tribe or band as requested in the form.

At the April 3, 2013 detention hearing, the juvenile court acknowledged receipt of Father's ICWA-020 form and inquired if Father had any more specific knowledge about his Indian ancestry, "like the tribe or area." Father responded, "No sir. My grandfather and my dad both died before I got any kind of information like that. I didn't meet my dad

until I turned eighteen. We didn't have no close contact because he was in and out of prison all his life." The court then asked, "Was there some family lore that they came from Indian ancestry." Father replied, "Yes, sir. I think it's going to be Cherokee. I'm not for sure. But my grandfather and dad are both fifty percent Cherokee—or my grandfather is seventy-five or something like that." The court then inquired, "What you heard over the years is possibly Cherokee, but you're not sure." Father responded, "I'm not for sure." The juvenile court found that ICWA may apply.

The social worker reported in the jurisdictional/dispositional report that on April 25, 2013, Mother denied any Native American ancestry and Father indicated he may have Native American ancestry but he did not know with what tribe. The jurisdictional/dispositional report also noted that at the "April 2, 2013" detention hearing, "[t]he Court found that ICWA does not apply to this case." The court's minute order of the *April 3* detention hearing, however, indicates that "ICWA may apply to this case" and as of April 3, 2013, notice pursuant to the ICWA was "provided as required by law."

On April 9, 2013, DPSS mailed a Notice of Child Custody Proceeding for Indian Child (Judicial Council Forms, form ICWA-030, hereafter ICWA Notice) to the Bureau of Indian Affairs (BIA). The ICWA Notice included Father's name, address, birth date and place of birth, and the paternal grandmother's and grandfather's names, and place of the paternal grandfather's death. No tribal affiliation was listed in the notice for either Father, his parents, or grandparents. In regard to information for the child's paternal

great-grandparents (Father's grandfather), the notice indicated, "No information available."

On April 22, 2013, DPSS received a letter from the BIA, acknowledging receipt of the ICWA Notice. The letter stated that the BIA did not determine tribal eligibility and that "kind of information must be obtained from the tribe itself, if tribal affiliation can be determined." The letter also noted that it was "the responsibility of the person claiming Indian ancestry to establish tribal affiliation." The letter further stated that the notice received contained insufficient or limited information to determine tribal affiliation and when additional information became available to forward the notice to the appropriate tribe(s).

On April 29, 2013, DPSS filed copies of the ICWA Notice, certified mail receipts, return receipts, and the response from the BIA.

DPSS attached a Florida Dependency Shelter Petition as to the child's sister to the jurisdictional/dispositional report in this case. The Florida petition stated that the child's sister was not subject to ICWA. The Florida juvenile court's order as to the sister indicated that the parents and their attorneys were present at the February 23, 2011 hearing and that Mother and Father had no objection to the petition and that inquiry had been made pursuant to ICWA.

On May 3, 2013, the juvenile court found that the child was not an Indian child and that ICWA did not apply.

On December 5, 2013, at the six-month review hearing, the juvenile court again found the child was not an Indian child and that ICWA did not apply. The juvenile court again found that ICWA did not apply at status review hearings held on July 7 and October 23, 2014.

II

DISCUSSION

Both parents argue the juvenile court erred in finding ICWA did not apply because the notice requirements of the ICWA were not satisfied.[5] Specifically, Father argues that although Father had "consistently indicated" he believed he had Cherokee Indian ancestry, DPSS sent the ICWA notice to the BIA, no notices were sent to any of the three federally recognized Cherokee tribes, and the notice failed to indicate Father's claim of Cherokee ancestry. Father further asserts that the notice failed to contain any identifying information concerning the paternal great-grandfather, including his name, despite Father's assertion that he believed the paternal great-grandfather was 50 or 75 percent Cherokee Indian, and there was no indication Father was unable to provide DPSS with the great-grandfather's name or other information.

We begin with an overview of ICWA, which was enacted to " 'protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.' " (*In re Karla C.* (2003) 113 Cal.App.4th 166, 173-174, quoting 25 U.S.C. § 1902.) Under ICWA, an " 'Indian child' " is a person who is a member of an Indian

[5] Mother also joins in Father's opening brief.

tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe. (25 U.S.C. § 1903(4).) "ICWA protects the interests of Indian children and promotes the stability and security of Indian tribes by establishing minimum standards for, and permitting tribal participation in, dependency actions. [Citations.] If there is reason to believe a child that is the subject of a dependency proceeding is an Indian child, ICWA requires that the child's Indian tribe be notified of the proceeding and its right to intervene." (*In re A.G.* (2012) 204 Cal.App.4th 1390, 1396; see 25 U.S.C. § 1912(a).) If the name of the tribe is not known, then notice must be provided solely to the BIA. (*In re Louis S.* (2004) 117 Cal.App.4th 622, 630; 25 U.S.C. § 1912(a); Welf. & Inst. Code, § 224.2, subd. (a).) These notice requirements are strictly construed because a tribe's right to intervene is meaningless if the tribe is unaware of the proceeding. (*In re Karla C.*, *supra*, at p. 174; *In re J.M.* (2012) 206 Cal.App.4th 375, 380.)

"[O]ne of the purposes of ICWA notice is to enable the tribe or BIA to investigate and determine whether the minor is an 'Indian child.' [Citation.]" (*In re Gerardo A.* (2004) 119 Cal.App.4th 988, 995.) " '[T]o establish tribal identity, it is necessary to provide as much information as is known on the Indian child's direct lineal ancestors.' [Citation.]" (*In re Karla C.*, *supra*, 113 Cal.App.4th at p. 175, quoting 25 C.F.R. § 23.11(b); see 25 U.S.C. § 1912(a); Welf. & Inst. Code, § 224.2, subd. (a); *In re J.M.*, *supra*, 206 Cal.App.4th at p. 380; *In re Desiree F.* (2000) 83 Cal.App.4th 460, 469.) As such, it must include all available information about the child's parents, maternal and

paternal grandparents and great grandparents, especially those with alleged Indian heritage, including maiden, married and former names and aliases, birthdates, places of birth and death, current and former addresses, and information about tribal affiliation including tribal enrollment numbers. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 703; 224.2, subd. (a)(5).) "A 'social worker has "a duty to inquire about and obtain, if possible, all of the information about a child's family history" ' required under regulations promulgated to enforce ICWA. [Citation.]" (*In re Robert A.* (2007) 147 Cal.App.4th 982, 989.)

Juvenile courts and child protective agencies have " 'an affirmative and continuing duty to inquire whether a [dependent] child . . . is or may be an Indian child.' [Citation.]" (*In re H.B.* (2008) 161 Cal.App.4th 115, 121; § 224.3; Cal. Rules of Court, rule 5.481.) As soon as practicable, the social worker is required to interview the child's parents, extended family members, the Indian custodian, if any, and any other person who can reasonably be expected to have information concerning the child's membership status or eligibility. (§ 224.3, subd. (c); *In re Shane G.* (2008) 166 Cal.App.4th 1532, 1539; Cal. Rules of Court, rule 5.481(a)(4).) " 'The [trial] court must determine whether proper notice was given under ICWA and whether ICWA applies to the proceedings. [Citation]. We review the trial court's findings for substantial evidence. [Citation.]' [Citation.]" (*In re Christian P.* (2012) 208 Cal.App.4th 437, 451.)

"Substantial compliance with the notice requirements of ICWA is sufficient. [Citation.]" (*In re Christopher I.* (2003) 106 Cal.App.4th 533, 566; accord, *In re*

Suzanna L. (2002) 104 Cal.App.4th 223, 237 [Fourth Dist., Div. Two].) However, the notice sent to the BIA and/or Indian tribes must contain enough information to be meaningful. (*In re Karla C.*, *supra*, 113 Cal.App.4th at p. 175.) Accordingly, substantial compliance requires the notice to include sufficient information—at least to the extent that it is both available and otherwise required by law—to give the tribe "a meaningful opportunity to evaluate whether the dependent minor is an Indian child within the meaning of the ICWA. [Citation.]" (*In re Louis S.*, *supra*, 117 Cal.App.4th at p. 629; accord, *In re Karla C.*, *supra*, 113 Cal.App.4th at p. 178.)

Here, the tribal name and the paternal great-grandfather's name were hardly unavailable. In fact, Father had specifically claimed at the April 3, 2013 detention hearing that he believed he had Cherokee Indian ancestry, albeit his responses were confusing. Father also stated that he believed his father (the paternal grandfather) was 50 percent Cherokee and that his grandfather (the paternal great-grandfather) was 50 to 75 percent Cherokee Indian. The name of Father's grandfather would have been readily available to DPSS had DPSS made appropriate inquiry. There is no indication in the record that Father could not supply his grandfather's name. Nonetheless, DPSS omitted the tribal name and claimed no information was available as to the paternal great-grandfather. In addition, curiously, DPSS sent the notice to the BIA rather than to any of the three federally recognized Cherokee tribes, despite Father claiming to have Cherokee Indian heritage. There can be no excuse for completely omitting the tribal name and the paternal great-grandfather's name or failing to send the notices to the Cherokee tribes.

DPSS essentially concedes that the notice was insufficient. It contends, however, the notice was not required because Father's claim of Native American ancestry was based on vague information and there were no other circumstances that show the court had reason to know the child had Indian ancestry. DPSS further asserts that any error was harmless since there was no evidence that the information could be obtained and that ICWA notice to a tribe was not required since Father had indicated he did not know his tribal affiliation. We reject these contentions.

As the record clearly indicates, at the detention hearing, Father claimed he had Cherokee Indian ancestry. He also submitted form ICWA-020, checking the box that stated, "I may have Indian ancestry." The juvenile court found Father's response sufficient to order DPSS to give ICWA notice. (See *In re Miguel E.* (2004) 120 Cal.App.4th 521, 549.) Although various appellate courts have held ICWA notice provisions are not triggered by "vague references" to Indian heritage, as noted by DPSS, (see, e.g., *In re J.D.* (2010) 189 Cal.App.4th 118, 125 [notice not required where paternal grandmother indicated possible Indian ancestry, tribe unknown]; *In re Jeremiah G.* (2009) 172 Cal.App.4th 1514, 1520-1521 [father's claim of Indian heritage, without naming the tribe and which he later retracted, insufficient to require notice under ICWA]; *In re O.K.* (2003) 106 Cal.App.4th 152, 154, 157 [grandmother's statement children may have Indian heritage, no known tribe, "too vague and speculative to give the juvenile court any reason to believe the minors might be Indian children"]; *In re Levi U.* (2000) 78 Cal.App.4th 191, 194, 198 [paternal grandmother's statement there might be Indian

ancestry on her mother's side, tribe unknown, insufficient to trigger notice requirements]), here, however, Father referred specifically to Cherokee ancestry. This reference was not vague and it triggered the notice requirement. (See, e.g., *In re Alice M.* (2008) 161 Cal.App.4th 1189, 1198 [mother's indication on Parental Notification of Indian Status form the child may be eligible for membership in the "Apache and/or Navajo" tribes, standing alone, "gave the court reason to know that [the child] may be an Indian child." (Italics omitted.)]; *In re J.T.* (2007) 154 Cal.App.4th 986, 988, 993 [notice requirement triggered by references to Cherokee and Sioux heritage]; *In re Damian C.* (2009) 178 Cal.App.4th 192, 195-196 [mother's reference on her ICWA-020 form to " 'Pasqua-Yaqui' " heritage sufficient to trigger notice requirement]; *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 257 [parents' statement the child has "Cherokee Indian heritage" sufficient to trigger notice requirement].)

Accordingly, we find no merit to DPSS's assertion that the information offered here was akin to that in other cases holding ICWA notice provisions were not triggered. DPSS's reliance on *In re O.K.*, *supra*, 106 Cal.App.4th 152, *In re Z.N.* (2009) 181 Cal.App.4th 282, *In re J.D.*, *supra*, 189 Cal.App.4th 118, and *In re Hunter W.* (2011) 200 Cal.App.4th 1454 is unavailing. This case is factually inapposite to those cases as noted above. (See e.g., *In re O.K.*, at pp. 155-157 [vague information about possible Indian heritage from a nonparty paternal grandmother in a section 366.26 hearing did not trigger ICWA notice requirements]; *In re Z.N.*, *supra*, at pp. 298-299 [though stating ICWA notice provisions were not triggered by assertions of great grandparents' Indian ancestry

where grandparents were not registered and had not established any tribal affiliation, court held any error was harmless in light of notices provided on behalf of half siblings]; *In re J.D.*, *supra*, at p. 125 [appellate court found the paternal grandmother's statement " 'I can't say what tribe it is and I don't have any living relatives to provide any additional information' " "too vague, attenuated and speculative to give the dependency court any reason to believe the children might be Indian children"]; *In re Hunter*, *supra*, at pp. 1467-1469 [mother's information was "too speculative" to trigger ICWA because although mother indicated she might have Indian heritage through her father and deceased paternal grandmother, she "could not identify the particular tribe or nation and did not know of any relative who was a member of a tribe" and "[s]he did not provide contact information for her father and did not mention any other relative who could reveal more information."].) Here, in contrast, although Father made confusing statements, he stated that his grandfather and father were Cherokee. This information was not "too indefinite" to trigger ICWA notice. (*In re O.K.*, at p. 158.)

Finally, we cannot conclude that any error was harmless. Omitting the paternal great-grandfather's name and information in the notice might arguably have been harmless, if DPSS had inquired of Father as to the paternal great-grandfather's information. Since Father here indicated that his great-grandfather had 50 or 75 percent Cherokee ancestry, the social worker should have followed up with Father to attempt to obtain the great-grandfather's name and other relevant information. Moreover, DPSS failed to mail the notice to the Cherokee tribes, but instead only mailed the notice to the

BIA. Thus, even if Father's responses were confusing, it is a mystery why DPSS did not mail notices to the Cherokee tribes or to include the great-grandfather's name.

As explained in *In re Marinna J.* (2001) 90 Cal.App.4th 731, 738, the requirement of notice is critical under ICWA because it fosters one of the ICWA's major purposes "to protect and preserve Indian tribes. (25 U.S.C. § 1901.) In fact, under certain circumstances . . . an Indian tribe possesses exclusive jurisdiction over child custody proceedings involving Indian children. (25 U.S.C. § 1911(b).)" (Accord, *In re Kahlen W.* (1991) 233 Cal.App.3d 1414, 1425 ["Indian tribes are independent communities possessing their own natural rights" and "Indian children are a tribe's most valuable resources"].) Given that the failure to provide ICWA notice affected the rights of an Indian tribe, such error was not harmless.

"Because the juvenile court failed to ensure compliance with the ICWA requirements, the court's order terminating parental rights must be conditionally reversed. This 'does not mean the trial court must go back to square one,' but that the court ensures that the ICWA requirements are met. [Citations.] 'If the only error requiring reversal of the judgment terminating parental rights is defective ICWA notice and it is ultimately determined on remand that the child is not an Indian child, the matter ordinarily should end at that point, allowing the child to achieve stability and permanency in the least protracted fashion the law permits.' [Citation.]" (*In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1168, fn. omitted.)

Based on the law and the record in this case, we conclude that the notice given was not in substantial compliance with ICWA. Because we have not found any other error, the appropriate disposition is a limited remand for the purpose of complying with ICWA. (*In re Terrance B.* (2006) 144 Cal.App.4th 965, 971-975; *In re Jonathon S.* (2005) 129 Cal.App.4th 334, 342-343 [Fourth Dist., Div. Two].)

III

DISPOSITION

The order of the juvenile court terminating parental rights is vacated, and the matter is reversed and remanded to the juvenile court with directions to order compliance with the ICWA inquiry and notice provisions in compliance with ICWA and related federal and state law. Specifically, the court must order DPSS to give valid notice to the Cherokee tribes. Inquiry should be made of Father, or any other paternal family members, as to information relating to the paternal grandparents and paternal great-grandparents in relation to their names, addresses, birth dates and place, and if deceased, date and place of death.

Once the juvenile court finds that there has been substantial compliance with the notice requirements of ICWA, or if the information is not available, it shall make a finding with respect to whether the child is an Indian child. If the juvenile court finds that the child is not an Indian child, it shall reinstate the original order terminating parental rights. If the juvenile court finds that the child is an Indian child, it shall set a

new section 366.26 hearing and it shall conduct all further proceedings in compliance with ICWA and related federal and state law.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

CODRINGTON
J.